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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

JOHN B. CONNALLY, JR., Secretary of the Treasury of the United States; GEORGE P. SHULTZ, Secretary-Designate of the Treasury; WILLIAM B. CAMP, Comptroller of the Currency; MYLES J. AMBROSE, Commissioner of Customs; JOHNNIE M. WALTERS, Commissioner of the Internal Revenue Service; HERMAN NICKERSON, JR., Administrator of the National Credit Union; THE BOARD OF GOVERNORS of the FEDERAL RESERVE SYSTEM; the FEDERAL HOME LOAN BANK BOARD; the FEDERAL DEPOSIT INSURANCE CORPORATION; and the SECURITIES AND EXCHANGE COMMISSION,

Appellants,

v.

THE CALIFORNIA BANKERS ASSOCIATION,

Appellee and Cross-Appellant.

Appellee's Jurisdictional Statement on Cross-Appeal

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INTRODUCTION

This is the Bank Secrecy Act Case.

Last October, a three-judge District Court for the Northern District of California entered an order enjoining in

part enforcement of Public Law 91-508, 84 Stat. 1114 (enacted October 26, 1970); 12 U.S.C. §§ 1829b and 1951-1959; 31 U.S.C. 1051-1122 (commonly known as the Bank Secrecy Act);[1] as well as applicable Treasury Regulations set forth 31 C.F.R., Part 103 (1972).[2]

The appellants filed a notice of appeal on November 13, 1972, and three days later the appellee filed a notice of cross-appeal.

OPINIONS BELOW

The opinion of the three-judge District Court for the Northern District of California is set forth at 347 F. Supp. 1242 (N.D. Cal. 1972), and is included with this statement as *Appendix C*.

THIS COURT'S JURISDICTION

The appeal and this cross-appeal center on the constitutionality of the Bank Secrecy Act, and specifically those provisions requiring financial institutions to make reports and maintain certain records.

On October 18, 1972, a three-judge District Court for the Northern District of California entered an order (1) enjoining enforcement of those provisions of the Act requiring reports of certain domestic currency transactions; but (2) holding constitutional those provisions requiring banks and other financial institutions to maintain certain records, and requiring reports of various foreign financial transactions.[3]

The appellants invoke this Court's jurisdiction under 28 U.S.C. §§ 1252 and 1253. Appellee invokes this Court's jurisdiction under 28 U.S.C. § 1253. See generally, *Goldstein v. Cox*, 396 U.S. 471 (1970).

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1. The text of the Act is included with this statement as *Appendix A*.

2. The Treasury Regulations are included with this statement as *Appendix B*.

3. The order is appended to this statement as *Appendix D*.

QUESTIONS PRESENTED

The questions presented by this cross-appeal are whether the record-keeping requirements of the Bank Secrecy Act (1) violate the Fourth Amendment guarantee against unreasonable search and seizure; and whether (2) those requirements confiscate a bank asset—the assurance of customer privacy—without due process of law.

STATEMENT OF FACTS

In October, 1970, Congress enacted legislation that has come to be known as the Bank Secrecy Act.[4] The Act was adopted "to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings".[5] The Act authorizes adoption of appropriate regulations by the Secretary of the Treasury.[6]

On March 31, 1972, the Treasury Secretary promulgated regulations that require prompt reports of certain financial transactions from individuals, banks and other financial institutions, and the copying and retention of virtually every writing and document that passes through the American banking system.[7]

This case came to court on June 22, 1972, with a suit by the plaintiff/appellee challenging the constitutionality of the Act and its implementing regulations, and seeking injunctive and declaratory relief. The District Court ordered consolidation with *Stark v. Connally*, U.S.D.C., N.D. Cal., No. 72-1045 WTS; convened a three-judge court[8] and

4. Public Law 91-508, 84 Stat. 114, *et seq.*
5. 31 U.S.C. § 1051. See also 12 U.S.C. § 1829b(a)(2).
6. 31 U.S.C. § 1053. See also 12 U.S.C. § 1829b(b).
7. See 31 C.F.R., Part 103.11-103.52 (1972).
8. See 28 U.S.C. § 2284.

issued a temporary restraining order enjoining the government from "implementing or enforcing those portions of the Act and Regulations requiring reports by banks, other financial institutions, and persons . . ."[9]

The plaintiff/appellee here joined with the plaintiffs in the *Stark* case, *supra,* in a motion for a preliminary injunction on July 17, 1972. On September 11, 1972, the three-judge court filed a memorandum decision, and entered an order on October 18, 1972, granting in part and denying in part the plaintiffs' motion. The government filed a notice of appeal to this court, and on November 16, 1972, the appellee here filed a notice of cross-appeal from that portion of the order, *supra,* denying its motion for an order enjoining enforcement, operation and execution of the record-keeping requirements of the Act.[10]

THE CROSS-APPEAL PRESENTS SUBSTANTIAL QUESTIONS

The Bank Secrecy Act makes banks and other financial institutions unwilling and unwitting diarists of their customers' financial lives. It imposes both record-keeping and reporting requirements on virtually all financial institutions.

The court below issued a preliminary injunction enjoining enforcement of the Act's reporting provisions, finding those provisions unconstitutional. The court below refused, however, to enjoin enforcement of the Act's record-keeping provisions. The latter require banks and other financial institutions to:

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9. Memorandum of Decision on Application for Temporary Restraining Order, June 30, 1972, *Stark v. Connally,* U.S.D.C., N.D. Cal., No. 72-1045 WTS, and Consolidated Case.

10. Title I and II of Public Law 91-508, 84 Stat. 1114-1124, now contained in 12 U.S.C. §§ 1730(d), 1829(b), and 1951-1959; and 31 U.S.C. §§ 1051-1062 and 1101-1122.

(1) Identify each person having an account;

(2) Identify each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any account;

(3) Identify any party not already identified for whose account any check draft or similar instrument has been received for deposit or collection; and

(4) Microfilm or otherwise reproduce any check, draft, or similar instrument either drawn on and presented to it for payment or received by it for deposit or collection.[11]

In alleged implementation of the foregoing the Secretary of the Treasury has promulgated regulations requiring banks, *inter alia,* to:

(1) Secure and maintain a taxpayer identification number for each person or legal entity maintaining an account;

(2) Secure and maintain the social security number of an individual having a financial interest in an account where one or more individuals maintain an account;

(3) Microfilm or copy each document granting signature authority or each deposit or share account;

(4) Microfilm or copy each statement, ledger card, "or other record" showing *each* transaction with respect to the account;

(5) Microfilm or copy each check, clean draft, or a money order drawn on the bank or issued by it, with exceptions under certain circumstances for accounts averaging at least 100 checks per month and which fall into certain specifically enumerated categories, such as dividend, payroll, employee and medical benefit checks;

(6) Microfilm or copy each item other than bank or periodic charges made pursuant to agreement with the customer comprising a debit to the account which

11. 12 U.S.C. § 1829b(c) and (d).

is not otherwise specifically required to be kept and which is not specifically exempted; and

(7) Microfilm or copy records prepared or received by a bank in the ordinary course of business which would be needed to reconstruct a checking account and trace a check deposited in the account through its domestic processing system or supply a description of the deposited check.[12]

Banks are required to retain the records necessary to reconstruct a checking account for two years. All of the other records described above are to be retained for five years.[13]

Banks have been ordered to make and retain the foregoing records, *inter alia,* because the Congress and the Secretary have determined that they "have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings."[14] Nowhere in the Act or regulations or in the legislative history is there any suggestion that the records are required for regulation or supervision of the banks as such. On the contrary, the Bank Secrecy Act is aimed at the banks' *customers.* The government cannot argue, for example, that copies of the fronts and backs of all checks or the records needed to reconstruct a checking account[15] are suddenly required by the Federal Deposit Insurance Corporation of the Federal Reserve Board.

The government could not hope to defend an act of Congress directing telephone companies to record and retain recordings of all telephone calls by all their various subscribers. Such an act would surely violate the Fourth Amendment right to freedom from "broad and unsuspected

12. 31 C.F.R. Part 103.34 (1972).
13. 31 C.F.R. Part 103.36(c) (1972).
14. 12 U.S.C. § 1829b(a), 31 C.F.R. Part 103.21 (1972).
15. See 31 C.F.R. Part 103.36 (a) and Part 103.34 (10) (1972).

governmental incursions into conversational privacy". *U.S. v. U.S.D.C., E.D. Mich.*, ... U.S. ....., 92 S.Ct. 2125, 2135 (1972). Checking accounts record a citizen's activities, opinions, and beliefs as fully as transcripts of his telephone conversations. The right to be protected is the same in both instances: privacy.

The record-keeping requirements of the Act exist for the sole purpose of the reporting requirements enjoined by the Court below. As such, the Act's record-keeping provisions are infected with the same malady—unreasonableness.

Finally, it is of course well-established that "the freedom of the people to enter into and carry out contracts in respect of their property and private affairs is a matter of great public concern and that such liberty may not lightly be impaired." *Highland v. Russell Car and Snow Plow Co.*, 279 U.S. 253, 261 (1929). This right to enter into contractual relations respecting personal affairs is protected by the due process clause of the Fifth and Fourteenth Amendments. *Allegeyer v. Louisiana*, 165 U.S. 578, 591 (1897); *Adair v. United States*, 208 U.S. 161, 174 (1908); *Coppage v. Kansas*, 236 U.S. 1, 14 (1914); *Adkins v. Childrens Hospital*, 261 U.S. 525, 546 (1923). Congress may, of course, regulate the making and performance of contracts "whenever necessary to effect any of the great purposes for which the national government was created." *Highland v. Russell Car and Snow Plow Co., supra*, at 261. But there can be no suggestion here that the Bank Secrecy Act is an aid of national defense or domestic security or that any of this nation's "great purposes" would be impaired by a decision of this Court limiting required record-keeping to those documents that would ordinarily be kept by financial institutions.

The Bank Secrecy Act is said to be aimed at "petty criminals, members of the underworld, those engaging in 'white collar' crime, and income tax evaders."[16] Their apprehension, however desirable, would not seem to be one of this nation's "great purposes," and cannot justify the invasion of privacy entailed in the record-keeping requirements of the Bank Secrecy Act.

Dated: January 8, 1973

Respectfully submitted,

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(Appendices Follow)

16. 2 Cong. and Adm. News 1970, 4395-96.

Appendix A

12 U.S.C. § 1829b.

§ 1829b. *Retention of records by insured banks—Congressional findings and declaration of purpose*

(a)(1) The Congress finds that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that microfilm or other reproductions and other records made by banks of checks, as well as records kept by banks of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in this respect.

(2) It is the purpose of this section to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

Rules and Regulations

(b) Where the Secretary of the Treasury (referred to in this section as the "Secretary") determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purposes of this section.

Identity of persons having accounts and persons authorized to act with respect to such accounts; exemptions

(c) Each insured bank shall maintain such records and other evidence, in such form as the Secretary shall require, of the identity of each person having an account in the United States with the bank and of each individual author-

ized to sign checks, make withdrawals, or otherwise act with respect to any such account. The Secretary may make such exemptions from any requirement otherwise imposed under this subsection as are consistent with the purposes of this section.

Reproduction of checks, drafts, and other instruments; records of transactions; identity of party

(d) Each insured bank shall make, to the extent that the regulations of the Secretary so require—

(1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and

(2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

Identity of persons making transactions reportable under the Currency and Foreign Transactions Reporting Act

(e) Whenever any individual engages (whether as principal, agent, or bailee) in any transaction with an insured bank which is required to be reported or recorded under the Currency and Foreign Transactions Reporting Act, the bank shall require and retain such evidence of the identity of that individual as the Secretary may prescribe as appropriate under the circumstances.

Additions to or substitutes for required records

(f) In addition to or in lieu of the records and evidence otherwise referred to in this section, each insured bank shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section.

Retention period

(g) Any type of record or evidence required under this section shall be retained for such period as the Secretary may prescribe for the type in question. Any period so prescribed shall not exceed six years unless the Secretary determines, having regard for the purposes of this section, that a longer period is necessary in the case of a particular type of record or evidence.

Report to Congress by Secretary of the Treasury

(h) The Secretary shall include in his annual report to the Congress information on his implementation of the authority conferred by this section and any similar authority with respect to recordkeeping or reporting requirements conferred by other provisions of law.

Sept. 21, 1950, c. 967, § 2[21], as added Oct. 26, 1970, Pub. L. 91-508, Title I, § 101, 84 Stat. 1114.

U.S.C. § 1951-1959.

§ 1951. *Congressional findings and declaration of purpose*

(a) The Congress finds that certain records maintained by businesses engaged in the functions described in section 1953(b) of this title have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that the power to require reports of changes in the ownership, control, and managements of types of financial institutions referred to in section 1952 of this title may be necessary for the same purpose.

(b) It is the purpose of this chapter to require the maintenance of appropriate types of records and the making of appropriate reports by such businesses in the United States where such records or reports have a high degree

of usefulness in criminal, tax, or regulatory investigations or proceedings.

Pub.L. 91-508, Title I, § 121, Oct. 26, 1970, 84 Stat. 1116.

§ 1952. *Reports on ownership and control*

Where the Secretary determines that the making of appropriate reports by uninsured banks or uninsured institutions of any type with respect to their ownership, control, and managements and any changes therein has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such banks or institutions to make such reports as he determines in respect of such ownership, control, and managements and changes therein.

Pub.L. 91-508, Title I, § 122, Oct. 26, 1970, 84 Stat. 1116.

§ 1953. *Recordkeeping and Procedures*

(a) Where the Secretary determines that the maintenance of appropriate records and procedures by any uninsured bank or uninsured institution, or any person engaging in the business of carrying on in the United States any of the functions referred to in subsection (b) of this section, has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such bank, institution, or person—

(1) to require, retain, or maintain, with respect to its functions as an uninsured bank or uninsured institution or its functions referred to in subsection (b) of this section, any records or evidence of any type which the Secretary is authorized under section 1829b of this title to require insured banks to require, retain, or maintain; and

(2) to maintain procedures to assure compliance with requirements imposed under this chapter. For the purposes of any civil or criminal penalty, a sep-

arate violation of any requirement under this paragraph occurs with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

(b) The authority of the Secretary under this section extends to any person engaging in the business of carrying on any of the following functions:

(1) Issuing or redeeming checks, money orders, travelers' checks, or similar instruments, except as an incident to the conduct of its own nonfinancial business.

(2) Transferring funds or credits domestically or internationally.

(3) Operating a currency exchange or otherwise dealing in foreign currencies or credits.

(4) Operating a credit card system.

(5) Performing such similar, related, or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in regulations.

Pub.L. 91-508, Title I, § 123, Oct. 26, 1970, 84 Stat. 1116.

§ 1954. *Injunctions*

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation under this chapter, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with any regulation of the Secretary under this chapter.

Pub.L. 91-508, Title I, § 124, Oct. 26, 1970, 84 Stat. 1117.

§ 1955. *Civil penalties*

(a) For each willful violation of any regulation under this chapter, the Secretary may assess upon any person to which the regulation applies, and, if such person is a partnership, corporation, or other entity, upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this section, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

Pub.L. 91-508, Title I, § 125, Oct. 26, 1970, 84 Stat. 1117.

§ 1956. *Criminal penalty*

Whoever willfully violates any regulation under this chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Pub.L. 91-508, Title I, § 126, Oct. 26, 1970, 84 Stat. 1118.

§ 1957. *Additional criminal penalty in certain cases*

Whoever willfully violates any regulation under this chapter, section 1829b of this title, or section 1730d of this title, where the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Pub.L. 91-508, Title I, § 127, Oct. 26, 1970, 84 Stat. 1118.

§ 1958. *Compliance*

The Secretary shall have the responsibility to assure compliance with the requirements of this chapter and sections 1730d and 1829b of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

Pub.L. 91-508, Title I, § 128, Oct. 26, 1970, 84 Stat. 1118.

§ 1959. *Administrative procedure*

The administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of Title 5 shall apply to all proceedings under this chapter, section 1829b of this title, and section 1730d of this title.
Pub.L. 91-508, Title I, § 129, Oct. 26, 1970, 84 Stat. 1118.

31 U.S.C. § 1051-1122.

§ 1051. *Congressional declaration of purpose*

It is the purpose of this chapter to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.
Pub.L. 91-508, Title II, § 202, Oct. 26, 1970, 84 Stat. 1118.

§ 1052. *Definitions and rules of construction*

(a) The definitions and rules of construction set forth in this section apply for the purposes of this chapter.

(b) The term "Secretary" means the Secretary of the Treasury.

(c) The term "person" includes natural persons, partnerships, trusts, estates, associations, corporations, and all entities cognizable as legal personalities. The term also includes any governmental department or agency specified by the Secretary either for the purpose of this chapter generally or any particular requirement thereunder.

(d) The term "United States", used in a geographical sense, includes the States and the District of Columbia, and to the extent the Secretary shall by regulation specify, either for the purposes of this chapter generally or any particular requirement thereunder, the Commonwealth of Puerto Rico, the possessions of the United States, United States military establishments, and United States diplomatic establishments.

(e) The term "financial institution" means any person which does business in any one or more of the following capacities:

(1) an insured bank as defined in section 1813 of Title 12;

(2) a commercial bank or trust company;

(3) a private banker;

(4) an agency or a branch within the United States of any foreign bank;

(5) an insured institution as defined in section 1724 of Title 12;

(6) a savings bank, building and loan association, credit union, industrial bank, or other thrift institution;

(7) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934;

(8) a broker or dealer in securities or commodities;

(9) an investment banker or investment company;

(10) a currency exchange;

(11) an issuer, redeemer or cashier of travelers' checks, checks, money orders, or similar instruments;

(12) an operator of a credit card system;

(13) an insurance company;

(14) a dealer in precious metals, stones, or jewels;

(15) a pawnbroker;

(16) a loan or finance company;

(17) a travel agency;

(18) a licensed transmitter of funds;

(19) a telegraph company;

(20) a Federal, State, or local government institution which performs any of the functions of any of the businesses listed above; or

(21) any other type of business or institution performing similar, related, or substitute functions specified by the Secretary by regulation for the purposes of the provision of this chapter to which the regulation relates.

(f) The term "domestic", used with reference to institutions or agencies, limits the applicability of the provision

wherein it appears to the performance by such institutions or agencies of functions within the United States.

(g) The term "financial agency" means any person which acts in the capacity of a financial institution or in the capacity of a bailee, depository trustee, agent, or in any other similar capacity with respect to money, credit, securities, or gold or transactions therein, on behalf of any person other than a government, a monetary or financial authority when acting as such, or an international financial institution of which the United States is a member.

(h) The term "foreign", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions outside the United States.

(i) References to this chapter or any provision thereof include regulations issued under this chapter or the provision thereof in question.

(j) All reports required under this chapter and all records of any such reports are specifically exempted from disclosure under section 552 of Title 5.

(k) For the purposes of section 1001 of Title 18 the contents of reports required under any provision of this chapter are statements and representations in matters within the jurisdiction of an agency of the United States.

(l) The term "monetary instruments" means coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this chapter to which the regulation relates.

Pub.L. 91-508, Title II, § 203, Oct. 26, 1970, 84 Stat. 1118.

§ 1053. *Regulations*

The Secretary shall prescribe such regulations as he may deem appropriate to carry out the purposes of this chapter. Pub.L. 91-508, Title II, § 204, Oct. 26, 1970, 84 Stat. 1120.

§ 1054. *Compliance*

(a) The Secretary shall have the responsibility to assure compliance with the requirements of this chapter and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

(b) The Secretary may by regulation require any class of domestic financial institutions to maintain such procedures as he may deem appropriate to assure compliance with the provisions of this chapter. For the purposes of both civil and criminal penalties for violations of this section, a separate violation shall be deemed to occur with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues. Pub.L. 91-508, Title II, § 205, Oct. 26, 1970, 84 Stat. 1120.

§ 1055. *Exemptions*

The Secretary may make such exemptions from any requirement otherwise imposed under this chapter as he may deem appropriate. Any such exemption may be conditional or unconditional, by regulation, order, or licensing, or any combination thereof, and may relate to any particular transaction, to the type or amount of the transaction, to the party or parties or the classification of parties, or to any combination thereof. The Secretary may in his discretion, in any manner giving actual or constructive notice to the parties affected, revoke any exemption made under this section. Any such revocation shall remain in effect pending any judicial review.
Pub.L. 91-508, Title II, § 206, Oct. 26, 1970, 84 Stat. 1120.

§ 1056. *Civil penalty*

(a) For each willful violation of this chapter, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this chapter, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

Pub.L. 91-508, Title II, § 207, Oct. 26, 1970, 84 Stat. 1120.

§ 1057. *Injunctions*

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of the provisions of this chapter, or of any order thereunder, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with the provisions of this chapter or any order of the Secretary made in pursuance thereof.

Pub.L. 91-508, Title II, § 208, Oct. 26, 1970, 84 Stat. 1120.

§ 1058. *Criminal penalty*

Whoever willfully violates any provision of this chapter or any regulation under this chapter shall be fined not more than $1,000, or imprisoned not more than one year, or both.

Pub.L. 91-508, Title II, § 209, Oct. 26, 1970, 84 Stat. 1121.

§ 1059. *Additional criminal penalty in certain cases*

Whoever willfully violates any provision of this chapter where the violation is—

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period,

shall be fined not more than $500,000 or imprisoned not more than five years, or both.

Pub.L. 91-508, Title II, § 210, Oct. 26, 1970, 84 Stat. 1121.

§ 1060. *Immunity of witnesses*

Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding involving any violation of this chapter before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order requiring him to give testimony or provide other information, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. No such testimony or other information so compelled under the order or evidence or other information which is obtained by the exploitation of such testimony may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Pub.L. 91-508, Title II, § 211, Oct. 26, 1970, 84 Stat. 1121.

§ 1061. *Availability of information to other Federal agencies*

The Secretary shall, upon such conditions and pursuant to such procedures as he may by regulation prescribe, make any information set forth in reports filed pursuant to this chapter available for a purpose consistent with the provisions of this chapter to any other department or agency of the Federal Government on the request of the head of such department or agency.

Pub.L. 91-508, Title II, § 212, Oct. 26, 1970, 84 Stat. 1121.

§ 1062. *Administrative procedure*

Subject to section 1052(j) of this title, the administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of Title 5, shall apply to all proceedings under this chapter.

Pub.L. 91-508, Title II, § 213, Oct. 26, 1970, 84 Stat. 1121.

Subchapter II.—Domestic Currency Transactions

§ 1081. *Reports*

Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

Pub.L. 91-508, Title II, § 221, Oct. 26, 1970, 84 Stat. 1122.

§ 1082. *Persons required to file reports*

The report of any transaction required to be reported under this subchapter shall be signed or otherwise made both by the domestic financial institution involved

and by one or more of the other parties thereto or participants therein, as the Secretary may require. If any party to or participant in the transaction is not an individual acting only for himself, the report shall identify the person or persons on whose behalf the transaction is entered into, and shall be made by the individuals acting as agents or bailees with respect thereto.

Pub.L. 91-508, Title II, § 222, Oct. 26, 1970, 84 Stat. 1122.

§ 1083. *Reporting procedure*

(a) The Secretary may in his discretion designate domestic financial institutions, individually or by class, as agents of the United States to receive reports required under this subchapter, except that an institution which is not insured, chartered, examined, or registered as such by any agency of the United States may not be so designated without its consent. The Secretary may suspend or revoke any such designation for any violation of this chapter, or section 1730d or 1829b of Title 12.

(b) Any person (other than an institution designated under subsection (a) of this section) required to file a report under this subchapter with respect to a transaction with a domestic financial institution shall file the report with that institution, except that (1) if the institution is not designated under subsection (a) of this section, the report shall be filed as the Secretary shall prescribe, and (2) any such person may, at his election and in lieu of filing the report in the manner hereinabove prescribed, file the report with the Secretary. Domestic financial institutions designated under subsection (a) of this section shall transmit reports filed with them, and shall file their own reports, as the Secretary shall prescribe.

Pub.L. 91-508, Title II, § 223, Oct. 26, 1970, 84 Stat. 1122.

Subchapter III.—Reports of Exports and Imports of Monetary Instruments

§ 1101. *Reports—Persons required to file*

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—

(1) transports or causes to be transported monetary instruments—

(A) from any place within the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

Contents of filed reports

(b) Reports required under this section shall be filed at such times and places, and may contain such of the following information and any additional information, in such form and in such detail, as the Secretary may require:

(1) The legal capacity in which the person filing the report is acting with respect to the monetary instruments transported.

(2) The origin, destination, and route of the transportation.

(3) Where the monetary instruments are not legally and beneficially owned by the person transporting the same, or are transported for any purpose other than the use in his own behalf of the person transporting the same, the identities of the person from whom the monetary instruments are received, or to whom they are to be delivered, or both.

(4) The amounts and types of monetary instruments transported.

Common carriers

(c) Subsection (a) of this section does not apply to any common carrier of passengers in respect of monetary instruments in the possession of its passengers, nor to any common carrier of goods in respect of shipments of monetary instruments not declared to be such by the shipper.
Pub.L. 91-508, Title II, § 231, Oct. 26, 1970, 84 Stat. 1122.

§ 1102. *Forfeiture*

(a) Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed under section 1101(a) of this title either has not been filed or contains material omissions or misstatements are subject to seizure and forfeiture to the United States.

(b) For the purpose of this section, monetary instruments transported by mail, by any common carrier, or by any messenger or bailee, are in process of transportation from the time they are delivered into the possession of the postal service, common carrier, messenger, or bailee until the time they are delivered into or retained in the possession of the addressee or intended recipient or any agent of the addressee or intended recipient for purposes other than further transportation within, or across any border of, the United States.
Pub.L. 91-508, Title II, § 232, Oct. 26, 1970, 84 Stat. 1123.

§ 1103. *Civil liability*

The Secretary may assess a civil penalty upon any person who fails to file any report required under section 1101 of this title, or who files such a report containing any material omission or misstatement. The amount of the penalty shall not exceed the amount of the monetary instruments with respect to whose transportation the report was required

to be filed. The liabilities imposed by this subchapter are in addition to any other liabilities, civil or criminal, except that the liability under this section shall be reduced by any amount actually forfeited under section 1102 of this title. Pub.L. 91-508, Title II, § 233, Oct. 26, 1970, 84 Stat. 1123.

§ 1104. *Remission of forfeiture or penalty*

The Secretary may in his discretion remit any forfeiture or penalty under this subchapter in whole or in part upon such terms and conditions as he deems reasonable and just. Pub.L. 91-508, Title II, § 234, Oct. 26, 1970, 84 Stat. 1123.

§ 1105. *Enforcement authority*

(a) If the Secretary has reason to believe that monetary instruments are in the process of transportation and with respect to which a report required under section 1101 of this title has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles.

Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law.

Pub.L. 91-508, Title II, § 235, Oct. 26, 1970, 84 Stat. 1123.

§ 1121. *Records and reports*

(a) The Secretary of the Treasury, having due regard for the need to avoid impeding or controlling the export or import of currency or other monetary instruments and having due regard also for the need to avoid burdening unreasonably persons who legitimately engage in transactions with foreign financial agencies, shall by regulation require any resident or citizen of the United States, or person in the United States and doing business therein, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail, as the Secretary may require:

(1) The identities and addresses of the parties to the transaction or relationship.

(2) The legal capacities in which the parties to the transaction or relationship are acting, and the identities of the real parties in interest if one or more of the parties are not acting solely as principals.

(3) A description of the transaction or relationship including the amounts of money, credit, or other property involved.

(b) No person required to maintain records under this section shall be required to produce or otherwise disclose the contents of the records except in compliance with a subpena or summons duly authorized and issued or as may otherwise be required by law.

Pub.L. 91-508, Title II, § 241, Oct. 26, 1970, 84 Stat. 1124.

§ 1122. *Classifications and requirements*

The Secretary may prescribe:

(1) Any reasonable classification of persons subject to or exempt from any requirement imposed under section 1121 of this title.

(2) The foreign country or countries as to which any requirement imposed under section 1121 of this

title applies or does not apply if, in the judgment of the Secretary, uniform applicability of any such requirement to all foreign countries is unnecessary or undesirable.

(3) The magnitude of transactions subject to any requirement imposed under section 1121 of this title.

(4) Types of transactions subject to or exempt from any requirement imposed under section 1121 of this title.

(5) Such other matters as he may deem necessary to the application of this subchapter.

Pub.L. 91-508, Title II, § 242, Oct. 26, 1970, 84 Stat. 1124.

Appendix B

31 C.F.R. § 103

TITLE 31—MONEY AND FINANCE: TREASURY

Chapter I—Monetary Offices, Department of the Treasury

Subpart A—Definitions

§ 103.11 *Meaning of Terms*

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Bank. (a) Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below.

(1) a commercial bank or trust company organized under the laws of any state or of the United States;

(2) a private bank;

(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;

(4) an insured institution as defined in section 401 of the National Housing Act;

(5) a savings bank, industrial bank or other thrift institution;

(6) a credit union organized under the laws of any state or of the United States; and

(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

(b) Each agent, agency, branch or office within the United States of a foreign bank.

Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Domestic. When used herein, refers to the doing of business within the United States, and limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

Financial institution. Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a bank;

(2) a broker or dealer in securities;

(3) a person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) a person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

(5) an operator of a credit card system which issues, or authorizes the issuance of, credit cards that may be used for the acquisition of monetary instruments, goods, or services outside the United States;

(6) a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Foreign bank. A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

Investment security. An instrument which

(1) is issued in bearer or registered form;

(2) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that title thereto passes upon delivery. The term does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Secretary. The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

United States. The various States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

Subpart B—Reports Required to Be Made

§ 103.21 *Determination by the Secretary*

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.22. *Reports of Currency Transactions*

Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

Except as otherwise directed in writing by the Secretary, this section shall not (1) require reports of transactions with Federal Reserve Banks or Federal Home Loan Banks; (2) require reports of transactions solely with, or originated by, financial institutions or foreign banks; or (3) require a bank to report transactions with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported because of the exemp-

tion contained in this paragraph shall be made to the Secretary upon demand therefor made by him.

§ 103.23 *Report of Transportation of Currency or Monetary Instruments*

(a) Each person who physically transports, mails, or ships, or causes to be physically transported, mailed or shipped, currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures or requests it to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by this section.

(b) Each person who receives in the United States currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion which have been transported, mailed, or shipped to such person from any place outside the United States with respect to which a report has not been filed under subsection (a) of this section, whether or not required to be filed thereunder, shall make a report thereof, stating the amount, the date of receipt, the form of monetary instruments, and the person from whom received.

(c) This section shall not require reports by (1) a federal reserve bank, (2) a bank, a foreign bank, or a broker or dealer in securities, in respect to currency or other monetary instruments mailed or shipped through the postal service or by common carrier, (3) a person who is not a citizen or resident of the United States in respect to cur-

rency or other monetary instruments mailed or shipped from abroad to a bank or broker or dealer in securities through the postal service or by common carrier, (4) a common carrier of passengers in respect to currency or other monetary instruments in the possession of its passengers, (5) a common carrier of goods in respect to shipments of currency or monetary instruments not declared to be such by the shipper, (6) a travelers' check issuer or its agent in respect to the transportation of travelers' checks prior to their delivery to selling agents for eventual sale to the public, nor by (7) a person engaged as a business in the transportation of currency, monetary instruments and other commercial papers with respect to the transportation of currency or other monetary instruments overland between established offices of banks or brokers or dealers in securities and foreign banks.

(d) This section does not require that more than one report be filed covering a particular transportation, mailing or shipping of currency or other monetary instruments with respect to which a complete and truthful report has been filed by a person. However, no person required by subparagraphs (a) or (b) of this section to file a report shall be excused from liability for failure to do so if, in fact, a complete and truthful report has not been filed.

§ 103.24 *Reports of Foreign Financial Accounts*

Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a United States person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship as required on his federal income tax return for each year in which such relationship exists, and shall provide such information concerning each such account as shall be specified in a special tax form to be filed by such persons.

§ 103.25 *Filing of Reports*

(a) Reports required to be filed by the first paragraph of Section 103.22 shall be filed on or before the forty-fifth day following that on which the reported transactions occur. They shall be filed with the Commissioner of Internal Revenue on forms to be prescribed by him, with the approval of the Secretary. All information called for in such forms shall be furnished.

(b) Reports required to be filed by Section 103.23(a) shall be filed at the time of entry into the United States or at the time of departure, mailing or shipping from the United States, unless otherwise directed or permitted by the Commissioner of Customs. They shall be filed with the Customs officer in charge at any Customs port of entry or departure, or as otherwise permitted or directed by the Commissioner of Customs. If the currency or other monetary instruments with respect to which a report is required do not accompany a person entering or departing from the United States, such reports may be filed by mail on or before the date of entry, departure, mailing or shipping, with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(c) Reports required to be filed by Section 103.23(b) shall be filed with the Commissioner of Customs within thirty days after receipt of the currency or other monetary instruments. They may be filed with the Customs officer in charge at any port of entry or departure, or by mail addressed to the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(d) Forms to be used in making the reports required by Sections 103.22 and 103.23 may be obtained from any Internal Revenue office; in addition, forms to be used in making the reports required by Section 103.23 may be obtained from any office of the Bureau of Customs.

§ 103.26 *Identification Required*

Before effecting any transaction with respect to which a report is required under the first paragraph of Section 103.22, a financial institution shall verify and record the identity, and record the account number on its books or the social security or taypayer identification number, if any, of a person with whom or for whose account such transaction is to be effected. Verification of identity for a customer of the financial institution depositing or withdrawing funds may be by reference to his account or other number on the books of the institution. Verification of identity in any other case may be by examination, for example, of a driver's license, passport, alien identification card, or other appropriate document normally acceptable as a means of identification.

Subpart C—Records Required to be Maintained

§ 103.31 *Determination by the Secretary*

The Secretary hereby determines that the records required to be kept by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.32 *Records to be Made and Retained by Persons Having Financial Interests in Foreign Financial Accounts*

Records of accounts required by Section 103.24 to be reported on a federal income tax return shall be retained by each person having a financial interest in any such ac-

count. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of five years and shall be kept at all times available for inspection as authorized by law. In the computation of the period of five years, there shall be disregarded any period beginning with a date on which the taxpayer is indicted or information instituted on account of the filing of a false or fraudulent federal income tax return or failing to file a federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding.

§ 103.33 *Records to be Made and Retained by Financial Institutions*

Each financial institution shall retain either the original or a microfilm or other copy or reproduction of each of the following:

(a) a record of each extension of credit in an amount in excess of $5,000, except an extension of credit secured by an interest in real property, which record shall contain the name and address of the person to whom the extension of credit is made, the amount thereof, the nature or purpose thereof, and the date thereof;

(b) a record of each advice, request, or instruction received regarding a transaction which results in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account, or place outside the United States;

(c) a record of each advice, request, or instruction given to another financial institution or other person located within or without the United States, regarding a transaction intended to result in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

§ 103.34 *Additional Records to be Made and Retained by Banks*

(a) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such bank shall secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim

checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item other than bank charges or periodic charges made pursuant to agreement with the customer, comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section;

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not not through a domestic financial institution, by letter, cable or any other means, from a person, account or place outside the United States;

(9) A record of each receipt of currency, other monetary instruments, checks, or investment securities, and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a person, account or place outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to

reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check. This subsection shall be applicable only with respect to demand deposits.

§ 103.35 *Additional Records to be Made and Retained by Brokers and Dealers in Securities*

(a) With respect to each brokerage account opened with a broker or dealer in securities after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such broker or dealer shall secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such broker or dealer shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Every broker or dealer in securities shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature or trading authority over each customer's account;

(2) Each record described in section 240.17a-3(a)(1), (2), (3), (5), (6), (7), (8) and (9) of Title 17, Code of Federal Regulations;

(3) A record of each remittance or transfer of funds, or of currency, checks, other monetary instruments, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(4) A record of each receipt of currency, other monetary instruments, checks, or investment securities and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a

domestic financial institution, from any person, account or place outside the United States.

§ 103.36 *Nature of Records and Retention Period*

(a) Wherever it is required that there be retained either the original or a microfilm or other copy or reproduction of a check, draft, monetary instrument, investment security, or other similar instrument, there shall be retained a copy of both front and back of each such instrument or document, except that no copy need be retained of the back of any instrument or document which is entirely blank or which contains only standardized printed information, a copy of which is on file.

(b) Records required by this subpart to be retained by financial institutions may be those made in the ordinary course of business by a financial institution. If no record is made in the ordinary course of business of any transaction with respect to which records are required to be retained by this subpart, then such a record shall be prepared in writing by the financial institution.

(c) Records which are required by Section 103.34(b)(10) to be retained by banks shall be retained for a period of two years. All other records which are required by this subpart to be retained by financial institutions shall be retained for a period of five years. All such records shall be filed or stored in such a way as to be accessible within a reasonable period of time, taking into consideration the nature of the record, and the amount of time expired since the record was made.

§ 103.37 *Person Outside the United States*

For the purposes of this subpart, a remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit to the domestic

account of a person whose address is known by the person making the remittance or transfer, to be outside the United States, shall be deemed to be a remittance or transfer to a person outside the United States, except that, unless otherwise directed by the Secretary, this section shall not apply to a transaction on the books of a domestic financial institution involving the account of a customer of such institution whose address is within approximately fifty miles of the location of the institution, or who is known to be temporarily outside the United States.

Subpart D—General Provisions

§ 103.41 *Dollars as Including Foreign Currency*

Wherever in this part an amount is stated in dollars, it shall be deemed to mean also the equivalent amount in any foreign currency.

§ 103.42 *Photographic or Other Reproductions of Government Obligations*

Nothing herein contained shall require or authorize the microfilming or other reproduction of

(1) currency or other obligation or security of the United States as defined in 18 U.S.C. 8, or

(2) any obligation or other security of any foreign government,

the reproduction of which is prohibited by law.

§ 103.43 *Availability of Information*

The Secretary may make any information set forth in any reports received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax, or regulatory investigation or proceeding

in connection with which the information is sought, and the official need therefor.

§ 103.44 *Disclosure*

All reports required under this part and all records of such reports are specifically exempted from disclosure under section 552 of Title 5, United States Code.

§ 103.45 *Exceptions, Exemptions, Modifications, and Reports*

(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable to the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

§ 103.46 *Enforcement*

(a) Responsibility for assuring compliance with the requirements of this part is delegated as follows:

(1) to the Comptroller of the Currency, with respect to national banks and banks in the District of Columbia;

(2) to the Board of Governors of the Federal Reserve System, with respect to state bank members of the Federal Reserve System;

(3) to the Federal Home Loan Bank Board, with respect to insured building and loan associations, insured

savings and loan associations, and insured institutions as defined in section 401 of the National Housing Act;

(4) to the Administrator of the National Credit Union Administration, with respect to federal credit unions;

(5) to the Federal Deposit Insurance Corporation, with respect to all other banks except agents of foreign banks which agents are not supervised by state or federal bank supervisory authorities;

(6) to the Securities and Exchange Commission, with respect to brokers and dealers in securities;

(7) to the Commissioner of Customs with respect to § 103.23 and § 103.48;

(8) to the Commissioner of Internal Revenue except as otherwise specified in this section.

(b) Over-all responsibility for coordinating the procedures and efforts of the agencies listed herein and assuring compliance with this part, is delegated to the Assistant Secretary (Enforcement, Tariff and Trade Affairs, and Operations). Periodic reports shall be made by each such agency to the Assistant Secretary, with copies to the General Counsel of the Treasury Department and to the Commissioner of Internal Revenue.

§ 103.47 *Civil Penalty*

(a) For any willful violation of any requirement of this part, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) For any failure to file a report required under Section 103.23 or for filing such a report containing any material omission or misstatement, the Secretary may assess a civil penalty up to the amount of the currency or monetary instruments transported, mailed or shipped, less any amount forfeited under Section 103.48.

§ 103.48 *Forfeiture of Currency or Monetary Instruments*

Any currency or other monetary instruments which are in the process of any transportation with respect to which a report is required under Section 103.23 are subject to seizure and forfeiture to the United States if such report has not been filed as required in Section 103.25, or contains material omissions or misstatements. The Secretary may, in his sole discretion, remit or mitigate any such forfeiture in whole or in part upon such terms and conditions as he deems reasonable.

§ 103.49 *Criminal Penalty*

(a) Any person who willfully violates any provision of this part may, upon conviction thereof, be fined not more than $1,000 or be imprisoned not more than one year, or both. Such person may in addition, if the violation is of any provision authorized by Title I of Public Law 91-508 and if the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, be fined not more than $10,000 or be imprisoned not more than five years, or both.

(b) Any person who willfully violates any provision of Title II of Public Law 91-508, or of this part authorized thereby, where the violation is either

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period, may, upon conviction thereof, be fined not more than $500,000 or be imprisoned not more than five years, or both.

(c) Any person who knowingly makes any false, fictitious or fraudulent statement or representation in any report required by this part may, upon conviction thereof, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

§ 103.50 *Enforcement Authority with respect to Transportation of Currency or Monetary Instruments*

(a) If the Secretary has reason to believe that currency or monetary instruments are in the process of transportation and with respect to which a report required under Section 103.23 of this part has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles. Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law or regulation.

§ 103.51 *Effective Date*

This part shall become effective July 1, 1972.

Appendix C

Appendix C

Original Filed Sep 11 1972
Clerk, U.S. Dist. Court San Francisco

United States District Court
Northern District of California

Fortney H. Stark, Jr., et al., *Plaintiffs,* —vs— John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.*	No. 72 1045
The California Bankers Association, *Plaintiff,* —vs— John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.*	No. 72 1157

MEMORANDUM OF DECISION

Before: *HAMLIN,* Circuit Judge, EAST and SWEIGERT, District Judges*

SWEIGERT, J.

Plaintiffs in No. 72 1045 include several named individuals who are bank customers, also the American Civil Liberties Association, suing on behalf of itself as a bank customer and also on behalf of such of its numerous members as are also bank customers; also a bank—the Security National Bank. The only plaintiff in No. 72 1157 is the California Bankers Association, suing on behalf of its membership, which comprises all California banks.

*Judge Hamlin dissents in part.

These plaintiffs seek to enjoin the Secretary of the Treasury from enforcing the provisions of the so-called Bank Secrecy Act, enacted by the Congress on October 26, 1970, to be effective May 1, 1971, and the Regulations issued thereunder on March 31, 1972 (but by their own terms not effective until July 1, 1972) upon the grounds that such enforcement poses grave and irreparable injury to their constitutional rights—their right to freedom from unreasonable search; their constitutional right of privacy; their privilege against self-incrimination; their right to due process as it may affect banks and bank customers, and also the right of private association protected by the First Amendment.

The Bank Secrecy Act (12 U.S.C. Sec. 1829b; 31 U.S.C. Secs. 1051-1122) requires banks and similar financial institutions to keep certain records and authorizes the Secretary of the Treasury to require such institutions and persons participating in transactions with such institutions to report financial transactions to the Secretary for the stated reason (Sec. 1051) that such records and reports have a high degree of usefulness in criminal, tax and other regulatory investigations.

The record-keeping provision of the Act is 12 U.S.C. Sec. 1829b—implemented by Treasury Regulation 31 C.F.R. subpart C, Secs. 103.31-103.37. Section 1829b(b)(c)(d) broadly requires financial institutions to maintain, not only customary ledger card records for commercial and savings accounts, but also to maintain microfilm of all checks, drafts or similar instruments drawn on or presented for payment or received for deposit or collection—an authorization which the Secretary has implemented (Regulation 103.31-103.37) with exceptions only for large accounts involving dividend, payroll or employee and medical benefit checks.

The temporary restraining order heretofore issued in this case has not been directed to the record-keeping provisions of the Act, and since we find no constitutional violation in these record-keeping provisions, as such, we reject plaintiffs' contentions insofar as those portions of the Act are concerned.

Turning, however, to the reporting provisions of the Act, those provisions are contained in Title 31 U.S.C. Secs. 1081, 1082, 1083, 1101 and 1121 and have been implemented by Treasury Regulations 31 C.F.R. Part 103, sub-part B, Secs. 103.21-103.26. These reporting provisions fall into two categories: (1) Those relating to *foreign* financial transactions (Secs. 1101 and 1121), and (2) those relating to *domestic* financial transactions (Sec. 1081).

Since, in our opinion, the reporting provisions relating to foreign transactions present no great problem we will first dispose of plaintiffs' challenges to those provisions.

Reporting of Foreign Financial Transactions

31 U.S.C. Sec. 1101 (Reports of Exports and Imports of Monetary Instruments) provides in substance that whoever knowingly transports monetary instruments from the United States or into the United States or receives such at the termination of the transportation to the United States in an amount exceeding $5,000 shall file a report in such form and detail as the Secretary may require setting forth certain specified (sub b) information—with certain qualifications (sub. c) as to common carriers.

Regulation 103.23 (Reports of Transportation of Currency or Monetary Instruments), implementing Section 1101 excepts transfers through normal banking procedures and makes some other exceptions (sub. c).

31 U.S.C. Sec. 1121 (Foreign Transactions) provides in substance that the Secretary of the Treasury, having due regard for the need for controlling export and import of

currency and also due regard to avoidance of unreasonably burdening legitimate transactions with foreign financial agencies, shall by regulation require residents of the United States, who engage in any transactions with a foreign financial agency, to maintain records or file reports, or both, setting forth such of the certain stated information as the Secretary may require. (See also, Sec. 1122).

Regulation 103.24, implementing Section 1121, provides in substance that each person subject to the jurisdiction of the United States, having a financial interest in a bank, securities or other financial account in a foreign country, shall report such relationship as required on his federal income tax return.

We are of the opinion that these portions of the Act, dealing with export and import of monetary instruments and with foreign monetary interests or accounts, do not violate any constitutional provision.

First of all, these is the general rule (which must always be the point of departure in cases calling for judicial review of legislation enacted by the Congress), that the wisdom of legislation and the need for it are matters for the Congress to decide and the Courts should not substitute their judgment for that of the Congress. (See, Justice Stewart dissent in *Griswold v. Connecticut,* 381 U.S. 479 (1965) at 526.) The foregoing reporting provisions of the Act are limited to a narrowly described area of international financial transactions and the Congressional decision falls within the general rule.

The Supreme Court, when dealing with matters of reporting to and surveillance by the executive, has traditionally recognized a distinction between domestic surveillance, on the one hand, and surveillance where foreign nations are involved, pointing out that what might be impermissible in domestic cases may be constitutional where foreign

powers are involved. See, *United States v. United States District Court*, ... U.S. ..... (6/19/72) (slip opinion pp. 10-12; p. 23).

Furthermore, the Act contains procedural protections applicable to its provisions for reporting these foreign transactions. For example, with respect to enforcement of Section 1101, the Act (Section 1105) provides that, if the Secretary has reason to believe that monetary instruments are being transported without reporting or with false reports, he may apply to the Court for a search warrant. Similarly, with respect to enforcement of Section 1121(b) (foreign transactions) that section provides that no person required to maintain records under the section shall be required to produce or disclose the same except with a duly authorized subpoena or summons as may be otherwise required by law.

We conclude that these provisions violate no constitutional guarantee and that, since these provisions, requiring report of certain foreign financial transactions, are clearly separable from provisions pertaining to the reporting of domestic financial transactions, plaintiffs' motion for a preliminary injunction as to the former is denied.

Reporting of Domestic Financial Transactions

A more formidable problem is presented by the Act's provisions authorizing the Secretary to require reporting to him by financial institutions, and also by persons participating in transactions with them, of domestic financial transactions.

31 U.S.C. Sec. 1081 (Domestic Currency Transaction-Reports) provides that transactions involving any financial institution shall be reported to the Secretary at such time and in such manner, and in such detail, as the Secretary may require, if they involve the payment, receipt or transfer of United States currency or such other monetary in-

struments, as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

Section 1082 provides that the report of any such transaction shall be signed or otherwise made both by the domestic financial institutions involved and by one or more of the other parties thereto or participants therein as the Secretary may require.

Regulation 103.22 (Reports of Currency Transactions), which partially implements these sections, requires financial institutions to report transactions involving currency of more than $10,000.

It will be noted that, although to date the Secretary has required reporting only by the financial institutions and then only of *currency* transactions over $10,000, he is empowered by the Act, as indicated above, to require, if he so decides, reporting not only by the financial institution, but also by other parties to or participants in transactions with the institutions and, further, that the Secretary may require reports, not only of currency transactions but of any transaction involving any monetary instrument—and in any amount—large or small.

Since, as already noted, the record-keeping provisions of the Act require banks to microfilm all checks, drafts or similar instruments drawn on or presented to or received for deposit or collection by a bank, and since, as noted, the Secretary may require reporting not only by the bank, but also by the other parties to, or participants in, any bank transaction, the required report can include, not only the bank's usual record of its customer's account, but also such information as is disclosed on the face or back of any check, draft or similar monetary instrument—i.e., information concerning the identity of the persons, firms or organizations with whom the drawer has chosen to deal and, further,

such additional "detail" concerning the transactions "as the Secretary may require" from both the bank and other parties or participants.

These reporting provisions of the Act must be considered along with other general provisions, e.g., Section 1053 which vests broad power in the Secretary to prescribe such regulations as he may deem appropriate to carry out the purposes of the Act; also under Section 1055 the Secretary may make and revoke exemptions from the Act's requirements as he may deem appropriate; these exemptions may be conditional or unconditional, by regulation or by order or by licensing, and they may relate to particular transactions or to particular parties. The Secretary has broadly implemented these authorizations in his Regulation 103.45, providing that in his sole discretion he may by written order make exceptions or exemptions or impose additional record-keeping or reporting requirements authorized by the statute or otherwise modify the requirements of the regulations.

Further, Section 1061 provides that the Secretary of the Treasury shall, upon such conditions and procedures as he may by regulation prescribe, make any information set forth in the required reports available, for any purpose consistent with the provisions of the Act, to any other federal agency at its request.

The question is whether these provisions, broadly authorizing an executive agency of government to require financial institutions and parties to or participants in transactions with them, to routinely report to it, without previous judicial or administrative summons, subpoena or warrant, the detail of almost every conceivable financial transaction as a surveillance device for the discovery of possible wrongdoing on the part of bank customers, is such an invasion of a citizen's right of privacy as amounts to

an unreasonable search within the meaning of the Fourth Amendment.[1]

That there is such a thing as a constitutionally protected "right of privacy" has been recognised by the Supreme Court in such cases as *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Katz v. United States*, 389 U.S. 347 (1967) and most recently in *United States v. United States District Court* ..... U.S. ..... (June 19, 1972).[1a]

In *Katz v. United States*, supra, the Supreme Court, holding that government eavesdropping violated the right of privacy upon which a person relied while using an otherwise public telephone booth, said: "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See, *Lewis v. United States*, 385 U.S. 206, 210 (1966); *United States v. Lee*, 274 U.S. 559, 563 (1927). But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected. See *Rios v. United States*, 364 U.S. 253 (1960); *Ex parte Jackson*, 96 U.S. 727, 733 (1877) . . . No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely on the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that

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1. It will be noted that anyone who refuses to so report does so upon peril of criminal prosecution under Section 1058.

1(a). See also, *Doe v. McMillan*, 442 F.2d 879 (D.C.Cir. 1971); *York v. Story*, 324 F.2d 250 (9th Cir. 1963); *Zimmermann v. Wilson*, 81 F.2d 847, 849 (3d Cir. 1936). But see, 25 F.Supp. (1938), aff'd in 105 F.2d 583, 586 (1939); *Dietmann v. Time*, 284 F.Supp. 925 (C.D.Cal. 1966); *City of Carmel v. Young*, 2 Cal. 3d 259, 85 Cal. Rptr. 1 (1970); *Brex v. Smith*, 146 Atl. 34 (New Jersey 1969).

the public telephone has come to play in private communication."

Harlan, J., concurring at p. 360-361, concerning what is meant by privacy, added: "My understanding of the rule is that there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'."

In the recent case of *United States v. United States District Court*, ... U.S. ..... (6/19/72) the Supreme Court, considering a presidential claim of legal right to wire tap telephone conversations (without court approval) when deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert its existing form of government, again unanimously held that the Fourth Amendment shields such a conversation from surveillance; that the government's duty to safeguard domestic security must be weighed against the potential danger that unreasonable surveillances pose to individual privacy; that Fourth Amendment freedoms cannot be properly guaranteed if domestic security surveillances are conducted solely within the discretion of the executive branch without the detached judgment of a neutral magistrate, especially when resort to appropriate warrant procedure would adequately serve the legitimate purposes of domestic security searches.

In *City of Carmel v. Young, supra*, the California Supreme Court, citing the principle laid down by the Supreme Court of the United States in *Griswold v. Connecticut, supra*, held that a statute requiring public officials and candidates for public office to disclose investments in excess of $10,000, although a laudable and proper legislative concern with possible conflicting interests of public servants, was, nevertheless, an invalid intrusion upon the right of privacy protected by the Fourth Amendment.

Does the constitutional principle laid down by the Supreme Court in the above cases apply in the present case where the government claims legal right to maintain routine surveillance, without summons, subpoena or warrant, over the details of citizens' financial transactions with banks and similar financial institutions for the broadly stated purpose of helping executive agencies of the government to investigate, not only tax and criminal matters, but also other unspecified "regulatory investigations"?

At the outset we must note the holdings in this and other circuits that communications between banks and their customers are not privileged communications in the technical sense of that term; that bank customers have no rights in bank records; that such records may be subpoenaed from the bank, even over the objection of the depositor, notwithstanding the fact that the records concern the customer's account; that customers have no standing to object to subpoenas requiring their bank to produce records of the customer's accounts and that the production by the bank of its records under subpoena is not, as to the customer, either a Fourth Amendment illegal search and seizure nor a Fifth Amendment self-incrimination. *Harris v. United States,* 413 F.2d 316 (9th Cir. 1969). See also, *Galbraith v. United States,* 387 F.2d 617 (10th Cir. 1968); *Application of Cole,* 342 F.2d 5 (2d Cir. 1965); *De Masters v. Arend,* 313 F.2d 79, 85 (9th Cir. 1963).

It seems, therefore, that bank customers have no recognizable right to claim invasion of their privacy merely because a government agency, by summons or subpoena, requires a bank to produce the bank's own records pertaining to the customer's financial transactions.

It will be noted, however, that the cases enunciating this rule all involved situations in which (1) the government agency was seeking only the bank's own records of the

customer's account, and (2) the government agency was following established procedures for obtaining such records by means of judicial or administrative summons, subpoena or warrant, e.g., 26 U.S.C. Sec. 7602 et seq., and (3) the government agency was seeking records claimed to be relevant and material to a specific matter then under inquiry, i.e., the correctness of a particular taxpayer's return.

In the operation of the domestic financial transaction reporting provisions of the Act here in question, none of these elements are present.

The power of the Secretary under the Act in question to require reports is not limited to the bank's own records or to information based thereon, e.g., the bank's ledger card record of the state of the customer's account or its own deposit slips or passbook entries. As already indicated, the Act goes much further to authorize the mandatory disclosure of information obtainable from microfilming checks and drafts and also detail information required from the parties to and participants in each transaction.

We do not consider it necessary to pass upon the technical question whether customer's checks, as such, become the property of the bank during the banking process. We do note, however, that banks have traditionally returned, either directly or through the clearing house, all checks each month to the original drawer of the checks. It would seem reasonable therefore, for the drawer of a check to regard himself as the real owner of his checks, subject only to normal banking processing, and to expect that detailed information shown only on the face of his checks will not be automatically broadcast throughout the vast government bureaucracy without at least some notice, summons, subpoena or warrant in connection with some legitimate pending inquiry.

Certainly, at least, a bank customer reasonably expects privacy concerning details of his personal financial affairs

not shown on either the bank's own records or on the face of the customer's checks and which must be disclosed only by the report required of the bank customer, himself, as a party to or participant in a financial transaction.

It would seem that, within these limitations, and within the meaning of *Katz*, supra, a bank customer does expect a degree of privacy in these matters and that such an expectation is one that society has been prepared to recognize as "reasonable."

As stated by the Supreme Court of California in *City of Carmel v. Young*, supra (Burke, J.) (p. 268): "In any event we are satisfied that the protection of one's personal financial affairs and those of his (or her) spouse and children against compulsory disclosure is an aspect of the zone of privacy which is protected by the Fourth Amendment and which also falls within that penumbra of constitutional rights into which government may not intrude absent a showing of compelling need and that the intrusion is not overly broad" . . . "the law must be shown necessary and not merely rationally related to the accomplishment of a permissible state policy. *Griswold v. Connecticut, supra*, 381 U.S. 479, 497. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. *Shelton v. Tucker, supra*, 362 U.S. 479."

The Act challenged in our pending case makes no provision for any summons, either judicial or administrative, as the means whereby the Secretary can demand reports from banks and their customers concerning the details of their financial transactions. He is empowered to peremptorily require such reports routinely—automatically—from the banks and from all parties and participants in financial transactions without any procedure whereby either the bank or the customer may in advance test the reasonableness of the demand.

Sections 7602 et seq., of the Internal Revenue Act of 1954 (26 U.S.C.), already above mentioned, establish procedures whereunder the Secretary of the Treasury, for the limited purpose of ascertaining the correctness of an individual's tax return, may summons the person liable or any person having possession or care of books of account relating to the business of that person or any other person, to appear and to produce such records and to give testimony as may be relevant or material to such inquiry.

Under these procedures the ultimate enforcement of the summons can be judicially controlled when challenged either by the bank or by the customer-taxpayer himself as an intervening third party interest whose financial transactions are involved. *Reisman v. Coplin*, 375 U.S. 440 (1964).[2]

The Act here in question contains no such procedural safeguards with respect to reporting of domestic transactions as are contained in this existing law whereunder the Treasury is already given ample but orderly opportunity to investigate tax violations by citizens.

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2. It is true that in *Donaldson v. United States*, 400 U.S. 517 (1971) the Court limited to some extent the holding of *Reisman* that the customer-taxpayer would have a right to intervene in the summons proceedings, holding that such a right to intervene is not absolute; that for example, there would be no right to intervene when the taxpayer has no proprietary interest in the summoned records (his sole interest being that they presumably contain details of payments to him); that, since he has no other protectible interest by way of privilege or otherwise, he had no absolute right to intervene; that an IRS summons may be issued in connection with a tax investigation if it is issued in good faith and prior to any recommendation for criminal prosecution. But, as pointed out by J. Douglas, concurring (p. 536), a taxpayer would clearly have standing to raise a claim of violation of his constitutional rights if a third party were ordered to produce records belonging to the taxpayer, citing *United States v. Kordell*, 397 U.S. 1, 7; and *Reisman v. Coplin*, 385 U.S. 440, 445. Further, legislation is now pending in Congress to modify any effect of *Donaldson* by providing that the government, when acting under IRS statutes, must first get the consent of the bank customer or show cause to obtain bank records concerning the customer.

Further, the Act presents the question whether there is any reasonable relationship between the end sought to be achieved, i.e., possible assistance to the government in its investigations of citizens, on the one hand, and on the other hand, the peremptory, sweeping, unsafeguarded reporting provisions which it authorizes the Secretary to require.

There can be no question about the power of Congress to require records and reports from business entities and citizens (*United States v. Morton Salt*, 338 U.S. 632 (1950)) provided, however, that any such records or reports bear some reasonable relationship to the matters under inquiry. See *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924), where the Court held that "a governmental fishing expedition into private papers on the possibility that they may disclose evidence of a crime, is so contrary to first principles of justice, if not defiant of the Fourth Amendment, that an intention to grant the power to a subordinate agency will not be attributed to Congress unless expressed in the most explicit language" . . . and . . . "access is confined to such documents as are relevant evidence to the inquiry or complaint before the commission. . . ."

In *Shapiro v. United States*, 335 U.S. 1 (1948) at 32-33 the Supreme Court recognized that "There are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record keeper himself," adding, "But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally regulate or forbid the basic activity concerned and can constitutionally require the keeping of

particular records subject to inspection by the administrator."

Various tests have been formulated to ascertain the reasonableness of a search and seizure, e.g., a search is unreasonable when "it is out of proportion to the ends sought" (*McMann v. Securities & Exchange Commission*, 874 F.2d 377, 379 (2d Cir. 1937, J. Learned Hand), "balancing the need to search against the invasion which the search entails." *Camara v. Mun. Ct.*, 387 U.S. 523 (1967); "a nexus . . . between the item seized and criminal behavior." *Warden v. Hayden*, 387 U.S. 294, 307 (1967).

As compared with the relatively specific and certainly vital national interests involved in *United States v. United States District Court*, supra, i.e., subversion of our form of government, which the Supreme Court has held, nevertheless, insufficient to justify invasion without prior judicial approval, of conversational privacy by wire tap surveillance, the stated reason given in the Act now in question, for invasion of bank customers' reasonable expectation of a degree of privacy, i.e., the mere general possibility that such surveillance will help in criminal, taxation and unspecified governmental investigations, is far more vague and far less convincing.

The same may be said of *City of Carmel v. Young*, supra, wherein the court held that even such an important and specific subject of legislative concern as conflict of interest among public employees was insufficient to justify an overbroad invasion of one's right of privacy in his financial affairs.

How far-fetched is the relationship between the surveillance authorized by this Act and the general expectation that it may uncover wrongdoing is indicated in its legislative history wherein an Assistant Secretary of the Treasury,

testifying before a Congressional Committee stated: "We believe that the imposition of an all-encompassing requirement to photograph all checks drawn on U. S. banks . . . could be impractical, wasteful, and counter-productive. In excess of 20 billion checks are drawn annually in the United States and flow through the banking system and only a small percentage of these are likely to be of use in criminal, tax or regulatory investigations and proceedings." Senate Hearings, p. 178.

Similarly a Commissioner of Internal Revenue testified as follows: ". . . Realistically, however, the creation of a mass of paper beyond our capacity to digest and utilize could have the effect of submerging and making unobtainable information of special interest to us. In other words, a rifle rather than a shotgun may represent the best approach to the problem." House Hearings, p. 68.

Remarkably, the government in its brief (7/13/72, p. 5) seems to recognize these considerations by interpreting the reporting provisions of the Act to mean that: ". . . Nothing in the statute gives the government any greater right to *access* to bank records than it possessed before. Consequently, *whenever the federal government desires to inspect any bank records kept under the provisions of the new statute, the federal government must resort to using an administrative summons or judicial subpoena as it did in the past.* Upon the issuance of such a summons or subpoena, if the bank customer felt that the use of the summons or subpoena constituted an illegal search and seizure under the Fourth Amendment, that contention could be contested in court in the same manner as it heretofore has been contested." (emphasis added).

Of course, if the government intends to obtain the information contemplated by the reporting provisions of the

Act only through use of administrative summons or judicial subpoena, as it has done in the past under existing law, then one may well question the need for this new legislation. However, we must look, not merely to what the government says it intends to do, but to the much broader authorization of the Act itself.

For the reasons above set forth we are of the opinion that the Act in question, insofar as it authorizes the Secretary to require virtually unlimited reporting from banks and their customers of domestic financial transactions as a surveillance device for the alleged purpose of discovering possible, but unspecified, wrongdoing among the citizenry, so far transcends the constitutional limits, as laid down by the United States Supreme Court for this kind of legislation, as to unreasonably invade the right of privacy protected by The Bill of Rights, particularly the Fourth Amendment provision protecting "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

We therefore, deem it unnecessary to consider plaintiffs' claims based upon the Fifth Amendment privilege against self-incrimination, the Fifth Amendment requirement of due process, and the First Amendment protection of freedom of association.

Plaintiffs' motion in the above consolidated cases for a preliminary injunction is granted to the extent of enjoining defendant from enforcing the reporting provisions of the Act concerning domestic financial transactions—but in no other respect.

This Memorandum constitutes the findings and conclusions of the Court within the meaning of Rules 52 and 65 of Federal Rules of Civil Procedure.
Dated: August 4th, 1972

O. D. Hamlin
Circuit Judge

/s/ William G. East
William G. East
District Judge

/s/ W. T. Sweigert
W. T. Sweigert
District Judge

STARK, et al. v. CONNALLY, et al.—No. 72-1045

CALIFORNIA BANKERS ASSOCIATION v. CONNALLY, et al.—No. 72-1157

HAMLIN, Circuit Judge, dissenting and concurring:

I concur in that portion of the majority opinion in the above case which upholds the constitutionality of 31 U.S.C. §§ 1101, 1121 and 1122, and the Treasury regulations implementing said sections.

I respectfully dissent, however, from that portion of said opinion which holds that 31 U.S.C. §§ 1081, 1082 and 1083 relating to domestic banking transactions are unconstitutional.

As I see it, there is no essential difference between the statutes covering domestic and those covering foreign banking requirements. The majority opinion refers to no authority which is directly on point. The references therein

to cases involving conversational privacy are to me inapposite. Any person or organization using banks for their own purposes does so knowing that the Code sections in question permit access to bank records by the government and reports by the banks concerning those records.

Courts should be slow in finding a Congressional enactment unconstitutional.

In this case, if any hardships result by reason of these statutes, application can be made to Congress for relief.

O. D. HAMLIN

Appendix D

Filed OCT 18 1972
CHARLES J. ULFERS, CLERK

United States District Court
Northern District of California

Fortney H. Stark, Jr., et al., *Plaintiffs,* – vs. – John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.*	No. 72 1045
The California Bankers Association, *Plaintiff,* – vs. – John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.*	No. 72 1157

ORDER GRANTING IN PART PRELIMINARY INJUNCTION

These actions having regularly come on for hearing pursuant to 28 U.S.C. §§ 2282 and 2284, F.R.Civ.P. 65, and LR 17, 114 and 117, Honorable William T. Sweigert, District Judge, Honorable William G. East, Senior District Judge and Honorable Oliver D. Hamlin, Senior Circuit Judge, presiding upon the plaintiffs' motion for a preliminary injunction and defendants' cross-motion to dismiss, and a memorandum of decision setting forth and specifying findings of fact and conclusions of law in accordance with F.R.Civ.P. 52 and 65(d) having been duly rendered and filed herein on September 11, 1972:

NOW, THEREFORE, in accordance with said memorandum of decision, it is hereby

(1) ORDERED that the temporary restraining order heretofore entered in this action on June 30, 1972, be and it hereby is dissolved; and it is further

(2) ORDERED that, it having been decided by the Court that certain provisions of Public Law 91-508, 84 Stat. 1114 (enacted October 26, 1970), are repugnant to Amendment IV of the Constitution of the United States—to wit: Sections 221, 222, and 223 of Chapter 2 of Title II (Short title: "Currency and Foreign Transactions Reporting Act") of said Public Law 91-508, 84 Stat. at 1122 (now contained in Sections 1081, 1082, and 1083 of Title 31. United States Code), plaintiff's motion to enjoin the enforcement, operation and execution of said specified provisions of said law is granted pending final adjudication of this action, and that defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order, be and they hereby are enjoined from enforcing and from implementing by regulations under Part 103, Subparts B and D of Title 31, Code of Federal Regulations, or otherwise, the provisions contained in Sections 1081, 1082, and 1083 of Title 31, United States Code, until further order of this Court or until the adjudication of this action otherwise becomes final; and it is further

(3) ORDERED that, it having been decided by the Court that the provisions of said Public Law 91-508, other than those specifically referred to and enjoined in clause (2) above are not repugnant to any provision of the Constitution of the United States, plaintiff's motion to enjoin the enforcement, operation and execution of all other provisions of said law—to wit: those provisions of Titles I and II of said Public Law 91-508, 84 Stat. 1114-1124, now con-

tained in Sections 1730d, 1829b, and 1951 through 1959 of Title 12, United States Code, and in Sections 1051 through 1062, and 1101 through 1122 of Title 31, United States Code, is denied in all respects; and it is further

(4) ORDERED that defendants' motion to dismiss the complaint for failure to state claims upon which relief can be granted is denied without prejudice.

ORDERED in accordance with 28 U.S.C. § 2284(5) this 18th day of October, 1972, at San Francisco, California.

/s/ WILLIAM G. EAST
William G. East
Senior District Judge

/s/ W. T. SWEIGERT
William T. Sweigert
District Judge